

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EMIL LEON PARKER)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-211-B-W
)	
UNITED STATES OF)	
AMERICA,)	
)	
Defendant)	

**RECOMMEND DECISION ON MOTION TO SUBSTITUTE AND TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Emil Leon Parker has instigated this action claiming that Elaine Luce, the Postmaster of the Anson, Maine post office, negligently or deliberately failed to forward his mail to the correct forwarding address. The United States has filed a motion to substitute the United States for Luce, claiming that she was acting within the scope of her employment vis-à-vis the handling of Parker's mail and also moves to have the complaint dismissed on the grounds that Congress has expressly stated Sovereign Immunity deprives the Court of jurisdiction from suits arising out of the miscarriage or negligent transmission of letters or postal matter. (Docket No. 13.) I recommend that the Court **GRANT** the motion to substitute and the motion for summary judgment, dismissing the complaint for lack of jurisdiction.

United States' Uncontested Statement of Material Fact

Emil Leon Parker resides in North Anson, Maine. (US SMF ¶ 1.) Elaine Luce, named as a defendant by Parker and of whose conduct Parker complains, is employed by the United States Postal Service as the Postmaster for the Anson Post Office. (Id. ¶ 2.)

Parker requested a change of address for mail coming to his North Anson address and asked that it be sent to an Oak Hill, Florida address for the period from December 26, 2000 to March 15, 2001. In early April 2001, Parker called Luce and advised that he had requested his mail be forwarded but had not received it. In response, Luce checked her database printout, which listed Parker's forwarding address as in Florida, and thereafter bundled Parker's mail and sent it to that Florida address. The Oak Hill, Florida Post Office held Parker's mail for thirty days thinking that Parker would show up to claim it. However, Parker had additionally filed a temporary change of address notification with the Post Office to have his mail sent to another address in New Jersey (although it did not appear on Luce's database printout). (Id. ¶ 3.)

Parker came into the North Anson Post Office in early May 2001 and again complained he had not received any mail. The mail at the Oak Hill Post Office in Florida was returned to the North Anson Post Office and delivered to Parker. (Id.)

Luce called the Postal Service consumer affairs office to determine whether there was anything that could be done concerning the late delivery of Parker's mail and Parker's creditors. On May 24, 2001, Luce wrote a "To Whom It May Concern" letter verifying "that the U.S. Postal Service was inadvertently responsible for the delay of correspondence addressed to . . ." to Parker. Luce further wrote that plaintiff used the Postal system in good faith, that the Postal Service failed to deliver plaintiff's mail in a timely manner, and apologized for the inconvenience caused by this delay. (Id. ¶ 4.)

On May 22, 2001, the Florida Circuit Court entered a Final Judgment of Paternity in the case brought by a mother of two minor children against Parker. On May 29, 2001, Parker sent the Florida Court a letter requesting that Court review his proposal regarding

visitation rights, attached a copy of Luce's May 24, 2001, letter, and requested that the letter be docketed as an objection. Parker had earlier presented this same proposal at a hearing on this matter on April 27, 2001. On August 28, 2002, the Florida Court entered an order denying Parker's motion to contest the final judgment of paternity as he had not filed a timely motion for rehearing or a notice of appeal. On April 4, 2003, plaintiff filed a notice of claim asserting monetary damages with the Postal Service. (Id. ¶ 6.)

On May 29, 2003, the Postal Service advised plaintiff by certified letter that the statute of limitations period was two years and that the two year period had run prior to Parker filing his administrative claim. Further, the Postal Service advised Parker that the Federal Tort Claims Act ("FTCA") specifically excluded liability for claims based on the loss, miscarriage, or negligent transmission of letters or postal matters. The claim was denied. Parker received this letter on June 3, 2003. (Id. ¶ 7.)

Parker asserts that he brings this lawsuit under the FTCA, 28 U.S.C. §§ 1346(b), and 2671 through 2680. Parker alleges that there was "misdelivery of his mail" and, as a result, his relationship with his children has been harmed, he was forced to abandon certain educational plans, and that he has suffered "psychological devastation." (Id. ¶ 8.)

Motion to Substitute

As set forth by the United States in its motion, the Postal Service is an independent establishment of the executive branch of the federal government, 39 U.S.C. § 201, the provisions of the FTCA are applicable to the Postal Service pursuant to 39 U.S.C. § 409(c). As a consequence, the provisions of 28 U.S.C. § 2679(a), which state that federal agencies cannot be sued in their own names, are applicable to the Postal

Service. The facts presented in this case warrant the substitution of the United States as a defendant pursuant to 28 U.S.C. § 2679(d)(2).

Parker's suit comes under the FTCA because Parker claims that Luce, an employee of the federal government, was negligent or worse in fulfilling her obligations in handling his mail, conduct that was within the scope of her office or employment. See 28 U.S.C. § 2679(b)(1).

Section 2629(b)(2) provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2). The United States Attorney for the District of Maine has certified that Ms. Luce was acting within the scope of her employment with the United States Postal Service at the time of the alleged tortious conduct. (Certificate Scope of Employment, Docket No. 13 Attach. 1.)

All that Parker states in his response to the United States' motion is that he does not think that Luce should be let out of the case if she acted deliberately. Parker has not countered the United States' factual assertion, supported by the Luce affidavit that Luce was unaware of the intervening New Jersey forwarding order and that at all times she was acting within the scope of her employment in handling Parker's mail. See Davric Maine

Corp. v. U. S. Postal Serv., 238 F.3d 58, 65-66 (1st Cir. 2001) (once a scope certification is made, the court dismisses the federal employee from the case and substitutes the United States as defendant; burden of proof is then on plaintiff to show the employee was acting outside the scope of his employment). Accordingly, I recommend that the United States be substituted as the proper party defendant in this case and Ms. Luce dismissed as an individual defendant.

Motion to Dismiss or for Summary Judgment

I address the United States' motion as framed as one for summary judgment. The United States is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to Parker and I indulge all reasonable inferences in his favor. See Savard v. Rhode Island, 338 F.3d 23, 25 -26 (1st Cir. 2003). However, to the extent that Parker failed to place the movants facts in dispute, I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003). Parker's pro se status does not relieve him of the duty to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor

does it mitigate this Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. 56.

I also agree with the United States that summary judgment must be granted because the waiver of sovereign immunity under the FTCA does not extend to the negligent transmission of letters of postal matter. Generally, the United States is immune from civil suit by private parties, except where the United States has expressly consented to suit, as set forth by statute. United States v. Mitchell, 445 U.S. 535, 538 (1980); Skwira v. United States, 344 F.3d 64, 72 (1st. Cir. 2003).

While Congress has waived sovereign immunity in limited instances, see 28 U.S.C. § 1346(b)(1), section 2680(a)-(n) of title 28 expressly excludes certain types of tort cases from the FTCA's waiver of immunity. Section 2680(b) specifically excludes from suit "(a)ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The United States Supreme Court, in concluding that the "foreign country" exception to waiver of government's immunity bars all claims against the government based on any injury suffered in foreign country, recently used § 2680 as an example of non-waiver explaining:

The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." Richards v. United States, 369 U.S. 1, 6 (1962); see also 28 U.S.C. § 2674. The Act accordingly gives federal district courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). But the Act also limits its waiver of sovereign immunity in a number of ways. See § 2680 (no waiver as to, e.g., "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," "[a]ny claim for

damages caused by the imposition or establishment of a quarantine by the United States," or "[a]ny claim arising from the activities of the Panama Canal Company").

Francisco Sosa v. Alvarez-Machain, __ U.S. __, 2004 WL 1439873, *6 (June 29, 2004) (emphasis added). See, e.g. Ruiz v. United States, 160 F.3d 273, 275 (5th Cir. 1998) (affirming district court's dismissal of FTCA claim for damages caused by his failure to receive his mail because such actions are statutorily barred by 28 U.S.C. § 2680(b)); Anderson v. U.S. Postal Serv., 761 F.2d 527, 528 & n.4 (9th Cir. 1985) (tort claim against the Postal Service for loss of package during a robbery was barred by sovereign immunity, citing § 2680(b) and the district court properly dismissed it); Kissell v. Mann, 750 F.Supp. 55, 56 -57 (D.N.H. 1990) (claim that post office did not exhibit reasonable care in delivering a package fell within the ambit of § 2680(b) and Court lacked jurisdiction to entertain the suit).¹

Conclusion

For these reasons I recommend that the Court **GRANT** the motion to substitute and **GRANT** summary judgment in favor of the United States.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

¹ I need not reach the third area in which the parties join issue: the timeliness of Parker's notice of claim filed with the United States on, it is not disputed, April 4, 2003.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated July 2, 2004

PARKER v. UNITED STATES OF AMERICA et al

Assigned to: JUDGE JOHN A. WOODCOCK JR.

Referred to:

Demand: \$157000

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:2271 Federal Tort Claims Act

Date Filed: 11/25/03

Jury Demand: None

Nature of Suit: 890 Other Statutory
Actions

Jurisdiction: U.S. Government
Defendant

Plaintiff

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V.

Defendant

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AMERICA**

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the Anson, Maine Post Office***